

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDALL TROY MORGAN,

Defendant-Appellant.

UNPUBLISHED

June 3, 1997

No. 189732

Washtenaw Circuit Court

LC No. 95-3952 FC

Before: Saad, P.J., and Hood and McDonald, JJ.

MEMORANDUM.

In a jury trial in Washtenaw Circuit Court, defendant was convicted of carjacking, and after being adjudicated a fourth offender, was sentenced to life imprisonment. He appeals by right.

Defendant first contends that the trial court erred in its instruction to the jury regarding the use that could be made of defendant's prior conviction for extortion, admitted for impeachment purposes. There was no contemporaneous objection, and defendant must establish manifest injustice to obtain appellate relief. *People v VanDorsten*, 441 Mich 540; 494 NW2d 737 (1993). The instruction at issue, however, could only be misunderstood if considered out of context. The record clearly reveals that the instruction was given in a very specific context, however, being prefaced by introductory language regarding credibility of witnesses, which was part of a series of instructions on witness credibility. This Court is of the opinion that the instruction was correct, but even if it were to some degree imperfect, reversal is not required because the instruction fairly presented the issue of the credibility of defendant with respect to a prior conviction admitted for impeachment purposes and sufficiently protected defendant's rights in that regard. *People v Zak*, 184 Mich App 1, 15; 457 NW2d 59 (1990).

Defendant next contends that the trial court erred in failing to instruct the jury on the defense of intoxication. Again, no such instruction was requested, and there was no objection to the instructions as given. This assignment of error is inextricably intertwined with defendant's further claim that the failure of defense counsel to request such instruction constituted ineffective assistance of counsel in a constitutional sense.

Inasmuch as the victim had identified another person as the carjacker at a corporeal lineup, and never purported to identify defendant as the perpetrator of the crime, defense counsel at trial pursued a defense of misidentification. Had defense counsel succeeded in raising a reasonable doubt about defendant's participation in the crime, an outright acquittal would have been obtained. Had counsel instead pursued, either in the alternative or in conjunction with the misidentification defense, an intoxication defense, there was a serious risk of either confusing the jury or undermining the misidentification defense, and the certain prospect that defendant would be found guilty at least of some lesser included offense, the punishment for which would be subject to augmentation by virtue of his fourth offender status. Given the evidence and options available to defense counsel, the record fails to establish that the decision not to pursue an intoxication defense was a dereliction reflecting a deficiency in performance below the minimal standards expected of competent criminal defense attorneys. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Affirmed.

/s/ Henry William Saad

/s/ Harold Hood

/s/ Gary R. McDonald